



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

RANDALL BOOK CORPORATION,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
COURT OF SPECIAL APPEALS OF MARYLAND

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,  
Attorney General of  
Maryland,

ANN E. SINGLETON,  
Assistant Attorney General  
Munsey Building - 4th Floor,  
Seven North Calvert Street,  
Baltimore, Maryland 21202,  
Telephone - (301) 576-6300,  
Of Counsel:  
Jane E. Pilliod,  
Assistant Attorney General.

QUESTION PRESENTED

Whether the Court of Special Appeals  
Erred In It's Interpretation of New York v.  
Ferber.

## TABLE OF CONTENTS

	<u>Page</u>
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	4
REASONS FOR DENYING THE WRIT.....	5
CONCLUSION .....	11

## TABLE OF CITATIONS

### Cases

Broderick v. Oklahoma, 413 U. S. 601, 615-616, 93 S. Ct. 2908, 2918, 37 L.Ed.2d 830, 843 (1973).....	9
Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973).....	10
New York v. Ferber, ____ U. S. 102 S. Ct. 3348, 72 L.Ed.2d 113 (1982) .....	5
Smiley v. State, 294 Md. 352, 450 A.2d 909 (1982).....	6

Statutory Provisions

Page

Maryland Annotated Code, Article 27,

§416A.....2, 4, 5, 7, 10  
§416D.....3, 4, 5, 7, 8, 10,

NO. 82-1718  
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CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States

[Amendment I]

**[Freedom of Religion, of Speech, and of  
the Press]**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances.

Annotated Code of Maryland, Article 27, §416A:

**416A    Definitions**

The following words and phrases, as used in this subheading, have the meanings indicated:

a. Advertising purposes means the purpose of propagandizing in connection with the sale commercially of the product or products, or the offering commercially of a service, or the exhibiting commercially of entertainment.

b. Minor means any person under eighteen years of age.

c. Sadomasochistic abuse means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

d. Sexual conduct means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

e. Sexual excitement means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sexual experiences of humans engaging in or witnessing sexual conduct or nudity. (1971, ch. 494).

416D     Displaying certain visual representations for advertising purposes.

a. Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items.

b. Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it. (1971, ch. 494)

STATEMENT OF THE CASE

On October 6, 1981, charging documents were filed against Randall Book Corporation, Petitioner, charging Petitioner with 252 violations of Md. Ann. Code, Article 27, §416D. Appellee filed a Motion to Dismiss alleging, among other grounds, that Article 27, §416D was unconstitutional because the statute was both vague and overbroad. Following a hearing on November 25, 1981, an Opinion and Order was entered on January 26, 1982, dismissing the charging documents because of the Court's decision that Article 27, 416A, "most particularly" subsections (c) and (e), which defines the terms used in Article 27, §416D, is vague and overbroad. A timely appeal was filed by the State on February 9, 1982. Petitioner cross-appealed the denial of its Motion to Suppress. On November 8, 1982, the Court of Special Appeals reversed the judgment of the Circuit

Court and found Article 27, §§416 A and D to be constitutional. It dismissed Petitioner's cross-appeal due to the absence of a final judgment. On February 24, 1983, the Court of Appeals denied Petitioner's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner contends that the Court of Special Appeals erred in its reliance on New York v. Ferber, \_\_\_\_ U. S. \_\_\_\_, 102 S. Ct. 3348, 72 L.Ed.2d 113 (1982). The gist of the supposed error is that the facts in Ferber are distinguishable from the facts of this case.

This contention is completely without merit, because the Court of Special Appeals did not rely on Ferber in any respect in deciding this case. Indeed, its decision does not even mention Ferber. Thus the question which Petitioner claims is presented for

review by the decision of the Court of Special Appeals in this case is answered quite simply by the fact that, because no reliance on Ferber is indicated, no error of interpretation could have occurred.

Petitioner's "Reasons for Granting the Writ" embody the following attenuated, indeed tortuous, logic: (1) In this case the Court of Special Appeals, declared itself bound by the decision of the Maryland Court of Appeals in Smiley v. State, 294 Md. 352, 450 A.2d 909 (1982). (2) Smiley, in turn, which referred to this Court's decision in Ferber, supra, relied on the factual similarity between it and Ferber. (3) Even if Ferber was validly applied in Smiley, its logic does not extend to this case, because the facts are different. A brief consideration of both the underlying propositions and the resulting conclusion reveals that this train of logic is erroneous and affords no proper basis for

the exercise of this Court's discretionary review.

Article 27, §§ 416A and D of the Maryland Code proscribe the use for advertising purposes of certain depictions of sexual conduct. The statute does not explicitly require that the proscribed depictions be "obscene".

In Smiley, the Court of Appeals considered whether this omission of an explicit requirement for obscenity rendered §§416A and D unconstitutional. Two constitutional defects were alleged: (1) a due process violation because of an alleged lack of guidelines as to what conduct was proscribed by those sections; and (2) a First Amendment violation because of alleged overbreadth.

The Court of Appeals held that, as to the due process claim, the legislative intent revealed that the challenged section "was broadly prohibiting advertising depicting obscenity", 294 Md. at 464. As a result, the challenged provisions were read to embody the guidelines set forth by this Court in Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973). In a footnote to this discussion, the Court pointed out in passing that, as construed, §416D "also embodied" the principle announced by this Court in New York v. Ferber, supra, that a state's interest in safeguarding the physical and psychological well-being of minors is compelling. Id.

On the question of the statute's overbreadth, the Court of Appeals held that the statute was not substantially overbroad. Any minor overbreadth, it said, could be cured through case by case analysis, citing

Ferber, 294 Md. at 462. However, the portion of Ferber relied on by the Court of Appeals in Smiley did not relate to Ferber's factual underpinnings. Rather, the Court of Appeals simply relied on Ferber's reaffirmation of the well-settled principle, first enunciated in Broderick v. Oklahoma, 413 U. S. 601, 615-616, 93 S. Ct. 2908, 2918, 37 L.Ed.2d. 830, 843 (1973), that facial overbreadth challenges must show that the challenged statute reaches a substantial number of impermissible applications, not merely that "it is possible to conceive of a single impermissible application." Id., 413 U. S., at 630, 93 S. Ct., at 2925.

In neither of its references to Ferber did the Smiley Court discuss or rely on the facts of Ferber. It made reference solely to certain legal principles discussed by this court in the Ferber opinion. Thus, the Court of Appeals did not suggest that Smiley was

factually similar to Ferber let alone find factual similarities to be crucial.

Similarly, the decision of the Court of Special Appeals in this case makes clear that its reliance on Smiley had nothing to do with the facts presented either by Smiley or by Ferber. Instead, it relied on the Smiley court's "authoritative construction" of a state obscenity statute, a procedure expressly authorized by this Court in Miller v. California, 413 U. S., at 24, 37 L.Ed.2d. at 430, 93 S. Ct. at 2615. Thus, the facts underlying Ferber, in addition to being unrelated to that case's citation in Smiley, are completely and totally irrelevant to this case.

Finally, Petitioner states no federal question requiring this Court's attention. The principles enunciated in Ferber clearly disposed of the questions concerning the constitutionality of Article 27, §§416A and

D, as raised in Smiley. That interpretation similarly controls this case. Thus there is no need for this Court to reexamine its holding in Ferber and no proper case presented here for review of Ferber's application to Maryland criminal law.

#### CONCLUSION

For the foregoing reasons, Respondent requests this Court deny the Petition for Writ of Certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

STEPHEN H. SACHS

ANN E. SINGLETON  
Assistant Attorney General  
Munsey Building - 4th Floor  
Seven North Calvert Street  
Baltimore, Maryland 21202  
Telephone - (301) 576-6300

Of Counsel:

Jane E. Pilliod  
Assistant Attorney General